

independent medical examiner did not find that the osteoarthritis in the left knee had been aggravated, accelerated or intensified by the left knee injury.

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction to review the October 1, 2008, preliminary hearing Order?
2. If so, did claimant prove his present need for medical treatment for his left knee is a natural consequence of the left knee injury that he sustained in April 2005 while working for respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

At the preliminary hearing on July 11, 2008, claimant requested authorization for left knee replacement surgery and temporary total disability benefits. Respondent had provided claimant medical treatment including arthroscopic surgery for his left knee after the alleged injury on April 11, 2005. But at the preliminary hearing the respondent denied claimant suffered accidental injury that arose out of and in the course of employment on April 11, 2005.

The first issue that must be addressed is whether the Board has jurisdiction to review the ALJ's preliminary hearing Order. Generally, issues concerning medical treatment, including whether claimant is in need of additional treatment and, if so, whether the treatment ordered by the ALJ is appropriate, are questions within the ALJ's jurisdiction to decide and are not reviewable by the Board on appeal from a preliminary hearing order. However, whether claimant's current condition and need for surgery is directly attributable to the April 11, 2005 accident is an issue the Board may review on an appeal from a preliminary hearing order because it gives rise to the jurisdictional issue of whether his injury and need for treatment arose out of and in the course of his employment with respondent.²

Derek M. Wentz was employed as a corrections officer for respondent. On April 11, 2005, he was getting a total count of all the inmates when he caught his left foot on a loose tile, twisted his leg and almost fell down. He noticed a sharp pain and it felt like something had snapped inside his left knee. Wentz reported the incident to his employer the same day and completed an accident report. He testified he thought his knee would get better and he continued to work.

² See K.S.A. 44-534a(a)(2) and K.S.A. 2005 Supp. 44-551(b)(2)(A).

It was not until March 2006 that claimant sought medical treatment after his knee did not get better. Ultimately, respondent referred claimant to Dr. Erik L. Severud. Claimant underwent arthroscopic surgery on August 23, 2006. Claimant testified he was off work for about a month due to the surgery. After his surgery, claimant received cortisone injections and a joint lubricant. He then developed a pulmonary embolism and received treatment at the Hutchinson Hospital. When he was released to return to work, claimant was placed on light-duty restrictions for approximately six months.

In May 2007, Dr. Severud released claimant from further treatment. Dr. Severud noted that the April 2005 injury caused a meniscus tear which was treated arthroscopically and that issue was resolved. Dr. Severud opined that claimant's continued complaints were related to the preexisting osteoarthritis in his knee. The doctor further opined that claimant will require a total knee arthroplasty sometime in the future but the causation for the knee replacement is related to the degenerative process called osteoarthritis and does not have any direct relation with the work-related injury that occurred in April 2005.

At claimant's attorney's request, Dr. Daniel D. Zimmerman examined and evaluated the claimant on June 7, 2007. Dr. Zimmerman concluded claimant was at maximum medical improvement from his April 2005 injury and he provided claimant with permanent impairment ratings. Dr. Zimmerman also noted that claimant would require a left total knee replacement at some time in the future. But Dr. Zimmerman did not specifically provide an opinion whether such future knee replacement would be the natural consequence of the April 2005 accident.

Because of continued knee pain, claimant sought further treatment with Dr. Ian S. Kovach who scheduled left knee replacement surgery. In response to a letter inquiry from claimant's attorney, Dr. Kovach opined that claimant's osteoarthritis, post traumatic in nature, should be considered as consequent to the left knee injury that required the arthroscopic procedure by Dr. Severud.

At the conclusion of the July 11, 2008 preliminary hearing the ALJ noted that Dr. Kovach attributed the need for additional medical treatment to the April 2005 work-related injury and Dr. Severud did not. Consequently, the ALJ suggested claimant be referred for an independent medical examination. The doctor the parties originally agreed upon to perform the examination did not accept the referral. Nor did several other physicians. Ultimately, Dr. John P. Estivo agreed to perform the independent medical examination of claimant.

Dr. Estivo reviewed claimant's medical records, performed an examination and opined that claimant suffered a medial meniscal tear to the left knee as a result of the April 2005 accidental injury. The doctor further noted claimant suffered preexisting advanced degenerative joint disease to the left knee which was unrelated to the April 2005 accidental injury. Dr. Estivo concluded that claimant's need for a knee replacement was not aggravated, accelerated, or intensified by his April 2005 accidental injury.

Upon receipt of the court ordered independent medical examination report from Dr. Estivo, the ALJ determined that the greater weight of the medical evidence established that claimant was suffering from the effects of degenerative joint disease, but that condition was neither caused, aggravated or accelerated by his work-related injury. Consequently, the ALJ denied claimant's preliminary hearing requests.

Based upon the record compiled to date, this Board Member agrees that the more persuasive medical evidence, provided by the treating surgeon and the court-ordered independent medical examiner, establishes that the claimant's work-related medial meniscus tear did not cause, aggravate or accelerate the degenerative joint disease in his knee. Consequently, this Board Member affirms the ALJ's Order.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁴

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated October 1, 2008, is affirmed.

IT IS SO ORDERED.

Dated this 31st day of December 2008.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge

³ K.S.A. 44-534a.

⁴ K.S.A. 2007 Supp. 44-555c(k).